In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 306

RALPH SANTANA, LIONEL MARQUEZ, FRANK SERRANO, ELIZA ROSARIO, LILLIAN SANTANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the order of the Court of Appeals for the Second Circuit (Pet. App. 5-6) dismissing their appeals for want of prosecution.

As appears from the affidavit of the Assistant United States Attorney, annexed to the government's motion to dismiss the appeal (Pet. App. 9-12), on October 28, 1965 the male petitioners pleaded guilty to an indictment charging them with conspiracy to import narcotics in violation of 21 U.S.C. 174, and the female petitioners to violations of 26 U.S.C. 4704

(a). On February 17, 1966, each was sentenced to a term of imprisonment (Pet. 10). The sentences imposed were higher than those recommended by the United States Attorney (see Pet. 2, 3). Petitioner Santana, on hearing his sentence, sought to withdraw his guilty plea without proffering any legal basis for such motion. The district court refused to honor the oral motion and directed that, if the motion were to be made, it be in writing. The other petitioners then sought either to adjourn their sentencing or to withdraw their guilty pleas, but the district court proceeded with the sentencing (Pet. 10).

Petitioners filed a notice of appeal on February 28, 1966 (Pet. 12). Nothing was done to perfect the appeal within the 40-day period fixed by Rule 39(c), F.R. Crim. P., nor was an extension of time sought to file the record on appeal (Pet. 12).* On April 14, the government made a motion, returnable more than two weeks later (on May 2, 1966), to dismiss the appeal for lack of prosecution (Pet. 7-8). In opposition to the motion, petitioners' counsel stated that, if the court permitted, petitioners would docket the appeal within ten days and file briefs within 30 days thereafter. Their affidavit set forth the fact that the judge had failed to follow the recommendations of the United States Attorney with respect to sentence (Pet. 14). They then stated that "it is not clear to us whether the appropriate remedy is by motion under Section 2255 of Title 28, United States Code, Rule

* Petitioners filed no written motions to withdraw their guilty pleas, although Serrano moved for reduction of sentence (Pet. 11).

32(d) or Rule 35 of the Federal Rules of Criminal Procedure. By allowing us the time requested, we will be able to make our determination and proceed accordingly, after being able to confer with our clients who are incarcerated in Pennsylvania, West Virginia, and Georgia" (Pet. 15). The court of appeals dismissed the appeal for lack of prosecution (Pet. 5-6).

There is no occasion for further review by this Court. Petitioners failed to offer any adequate excuse for their failure to perfect the appeal; counsel had ample time after sentencing on February 17 to decide on their course of action, even before the notice of appeal was filed. Certainly, in the period after appeal was noted, they were in a position to determine whether to proceed with the appeal. Moreover, petitioners have signally failed to show that the appeal would present any issue of merit. Admittedly, it was made clear to them before they pleaded guilty that the recommendations of the United States Attorney would not be binding on the judge. The mere fact that a defendant is disappointed in the sentence imposed plainly does not justify withdrawal of his guilty plea. *United States* v. *Marcus*, 213 F. 2d 230 (C.A. 7), certiorari denied, 348 U.S. 824; *Williams* v. *United States*, 192 F. 2d 39 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 225352 49